

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7075

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
Richard W. Baldwin

-----X
ESSO NEDERLAND b.v., :

Plaintiff-Appellee, :

-against- :

Docket Number
77-7075

M.T. TRADE FORTITUDE, her engines, :
boilers, etc., and :
MARASTRO COMPANIA NAVIERA, S.A., :

Defendants-Appellants: :
-----X

REPLY AND ANSWERING
BRIEF FOR APPELLANTS

(On appeal from the United States District Court
for the Southern District of New York)

CARDILLO & CORBETT
Attorneys for Defendants-Appellants
Office & P.O. Address
29 Broadway
New York, New York 10006

Richard W. Baldwin
Of Counsel

TABLE OF CONTENTS

POINT I	p. 1
The District Court Erred in Holding There Was a Short Delivery of Cargo	
POINT II	p. 4
The District Court Erred in Holding That There Was No Custom for a Carrier to be Given a 0.5% Allowance for Loss of Cargo in Transit	
POINT III	p. 7
The District Court Was Correct in Not Using the Shore Tank Measurements in Calculating Plaintiff's Damages	
POINT IV	p. 14
The District Court Was Correct in Refusing to Include as an Element of Damages the Cost of Transporting a Replacement Cargo to the Port of Discharge	
POINT V	p. 15
The District Court was Correct in Measuring the Extent of Plaintiff's Damages	
CONCLUSION	p. 16

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
:
ESSO NEDERLAND b.v.,

Docket No. 77-7075

Plaintiff-Appellee,
Cross-Appellant,

-against-

:
M. T. TRADE FORTITUDE, her engines,
boiler, etc., and MARASTRO COMPANIA
NAVIERA, S. A.,

Defendants-Appellants-
Cross-Appellee.
-----x

DEFENDANTS-APPELLANTS-CROSS-
APPELLEES REPLY AND ANSWER-
ING BRIEF

REPLY

POINT I

THE DISTRICT COURT ERRED IN HOLDING
THERE WAS A SHORT DELIVERY OF CARGO

It is respectfully submitted that this Court upon a review of the evidence will reach the conviction that "a mistake has been committed" thereby placing this case within the "clearly erroneous" rule set forth in the United States v. United States Gypsum Co., 333 U.S. 364 (1948) relied upon by plaintiff.

While setting forth on pages 43 and 44 of its brief a list of citations supporting the proposition that a court

2

should not draw inferences or make assumptions unless clearly established by the evidence presented, Plaintiff, in support of its argument that the District Court was correct in finding a shortage, asks this Court to assume that the alleged loss occurred "as a result of leakages from the vessel through cracks in the hull and piping and/or leaky valves". There was absolutely no evidence presented to indicate any cracks or leaky valves. In fact, the evidence presented by Defendant negates any such assumption. The transferring of cargo during the voyage was normal and necessary for the safety of the vessel and was so testified to by Plaintiff's own witness.

In further support of its argument Plaintiff offers a self-contradictory theory that the cargo on board leaked out through one of these cracks or that water entered the vessel through one of these cracks. Logic and the law of physics precludes Plaintiff from having it both ways. The "head" or pressure of the cargo or water would only permit exit of the cargo or entry of the water but not both. The finding of additional water in the cargo at Rotterdam can easily be explained by the admitted presence of "slops" on board at the time of loading. The evidence established that these "slops" were comprised mostly of water, which, during transit, would have become comingled with the cargo on board.

The argument presented by Plaintiff and the District Court's finding that the vessel's tanks were not accurately calibrated is completely absent any supporting evidence. In fact, the District Court correctly precluded Plaintiff from offering evidence about other ships and averages of over-calibration in the industry. There was no evidence offered with respect to the TRADE FORTITUDE.

The real issue before this Court is whether or not Plaintiff proved a loss existed. Both sides concede that the quantity of cargo indicated in the Bill of Lading was the amount of cargo delivered to the vessel (Plt. Brief p. 18). Defendant's only obligation under the Bill of Lading was to deliver that quantity of cargo. The District Court's refusal to use that quantity in calculating or determining the amount of cargo delivered is clearly erroneous. Since the evidence established that the quantity on board the vessel upon arrival at Rotterdam when compared with the Bill of Lading reveals a surplus in gross quantities and a minimal shortage in net quantities, Defendant has no liability for the alleged short delivery of cargo.

Defendant agrees with Plaintiff that the citation, 1 Carver, Carriage by Sea (12th Ed. 1971), §75. p. 64, cited in Plaintiff's brief on page 19, clearly sets forth a ship owner's obligation. That obligation is to "deliver the full amount of goods signed for by the Master in the

Bill of Lading". The evidence in the instant case clearly established that the Master of the TRADE FORTITUDE in fact delivered the quantity signed for by him in Bonny.

The Dry Tank Certificate clearly establishes that all cargo aboard the vessel upon arrival at Rotterdam was delivered to Plaintiff. Since the evidence established that there was no spillage or pollution problem or that the vessel could use this cargo for fuel or that the vessel deviated on this voyage, it is clear that the Bill of Lading quantity arrived at Rotterdam and was discharged from the vessel.

REPLY

POINT II

THE DISTRICT COURT ERRED IN HOLDING THAT
THERE WAS NO CUSTOM FOR A CARRIER TO BE
GIVEN A 0.5% ALLOWANCE FOR LOSS OF CARGO
IN TRANSIT

The "knowledge of the custom, and an intention to incorporate it", can properly be assumed, from the evidence before the District Court and the District Court's refusal to allow such a customary allowance was clearly erroneous.

In addition to the testimony by Mr. Nichols quoted out of context by Plaintiff on page 25 of its brief, the evidence from Plaintiff itself clearly establishes the existence of such a custom. Plaintiff chooses to ignore such evidence in its brief.

Plaintiff, as early as April 8, 1974, when it initiated

its claim against the Defendant for the alleged cargo shortage, recognized and applied the customary 0.5% allowance for loss in transit. The pertinent part of the letter in question is contained on page 14 of Defendant's main brief.

Mr. Scott, who testified on behalf of Plaintiff, confirmed that Plaintiff was aware of such a custom (App. p. T. 25). In initiating its claim against Defendant and before calculating the amount of its claim, Plaintiff, through Mr. Scott, made allowance for this customary tolerance. Its demand for payment was for a sum calculated after allowance for this tolerance.

Furthermore, Plaintiff, in submitting this claim to its New York affiliate, also made allowance for this 0.5% "standard transportation loss", before calculating the amount of its claim.

In view of the documentary evidence and Mr. Nichols' testimony, it is respectfully submitted that Mr. Scott's attempt to explain away this customary allowance as a settlement tool is incredible and should have been dismissed as such by the District Court.

Plaintiff's curt dismissal of the arbitration awards cited by Defendant as having no value as precedent, ignores their evidentiary value in confirming the custom of the trade in permitting the 0.5% allowance and in ignoring their value

as precedent in the shipping industry.

In the VIRGINIA LILY (SMA, Award 1052, p. 3, appendix 1 to Defendant's main brief) the arbitrators referred to this custom as the "generally accepted $\frac{1}{2}\%$ " tolerance. In MARIANTHI K (SMA, Award 1058, p. 3, appendix 2 to Defendants main brief) the arbitrators referred to it as the "customary allowance of $\frac{1}{2}\%$ ", and in the EVNOS (SMA, Award 1059, p. 5, appendix 3 to Defendant's main brief) it is referred to as the "standard practice".

Plaintiff's argument that the Hague Rules prohibit such a custom, is obviously without merit when one reads the citation from Carver contained on page 29 of Plaintiff's brief setting forth the rule that no written contract of carriage can relieve a carrier from liability for negligence, fault or failure in the duties and obligations of such carrier. The reliance by Plaintiff on these rules is inapplicable to the facts of this case.

Because the only testimony offered and because of the admission by Plaintiff cited above, it is respectfully submitted that the District Court erred in not finding and applying a 0.5% loss tolerance in calculating Plaintiff's alleged damages.

ANSWERING

POINT III

THE DISTRICT COURT WAS CORRECT
IN NOT USING THE SHORE TANK
MEASUREMENT IN CALCULATING
PLAINTIFF'S DAMAGES.

The issue of when delivery of a liquid cargo is complete was answered in Centerchem Products v. A/S Rederiet Odfjell, 1972 AMC 373 (E.D.Va. 1971) wherein the court held that the ocean carrier had effected delivery of its liquid cargo once it had left the ship's pipes and entered the flexible hose supplied by the cargo owner's agent to receive the cargo. This is precisely what occurred in the case at bar, and there is no doubt that once the crude oil was pumped through the vessel's flange into Chevron's (plaintiff's agents) pipes, delivery was completed. Furthermore, Mr. Scott of E.I.C. admitted that the plaintiff took possession of the cargo once it passed through the vessel's flange.

It is clear that plaintiff herein is relying on shore figures taken after delivery to substantiate its claim. The court was faced with the similar problem in Dow Chemical Co. (U.K. v. S.S. Giovanella D'Amico, 297 F. Supp. 699, 1970 AMC 379 (S.D.N.Y. 1969).

There, plaintiff attempted to prove its claim for short discharge by computing the difference between the ship's ullage figures taken by an independent cargo surveyor upon loading and shore tank figures taken by a chemical laboratory at Rotterdam after discharge.

In rejecting the shore figures taken after discharge as reliable, the Court observed:

"The [shore tank] certificates were not delivery receipts but merely expressed measurements of quantities of the chemical found in various shore tanks or lighters. There was nothing in the certificates which necessarily established that those amounts represented the sum total of the [cargo] which had been on board or was removed from the Giovannella at Rotterdam. The certificates themselves bore no notation connecting the amounts measured with the total cargo on board or removed from the vessel." (297 F.Supp. at 707). (emphasis added).

The Court next noted, as is the case here, that a dry tank certificate had been issued to the shipowner and that therefore all the cargo on board at arrival had been discharged. Finally, the Court compared the ship's ullage figures after loading and before discharge, but rejected them as contradictory since the discharge figures showed a surplus.

Faced with such self-contradictory and inconclusive evidence, the Court held that a mere shortage of the shore tanks did not carry the burden of proof from the plaintiff - Dow - when all the ullage readings and dry tank certificates indicated no shortage at the time the vessel unloaded at Rotterdam.

It is defendant's position that in the instant case, the District Court, as was the Court in Dow Chemical, supra, was faced with a set of self-contradictory and inconclusive figures concerning the vessel's cargo. However, two things are clear, first, that the vessel arrived in Rotterdam with substantially all of the cargo on board that it had contracted to carry and that plaintiffs had paid for, and secondly, that this entire amount was discharged. As such, defendant contends that the Dow Chemical case squarely supports its position that the plaintiff has failed to establish any liability on defendants' part for a cargo shortage.

In Centerchem Products v. A/S Rederiet Odfjell, supra, the Court clearly recognized the fallacy of basing cargo shortage claims on measurements taken at shore facilities after delivery of the cargo as follows:

"It is, therefore, the opinion of this court that the defendant-carrier had effected proper delivery once the chemical had left the ship's pipes and entered the flexible hose. Since the plaintiff was unable to show any loss of glyoxal prior to this delivery, there can be no judgment against the carrier.

"As a practical matter this is the only conclusion which could be reached. To require the carrier to inspect a maze of piping and shortage tanks over which it had no control or expertise would be burdensome if not impossible."
(1972 AMC at 375).

In a recent maritime arbitration, the Virginia Lily, (SMA No. 1052, N.Y. 1976) the arbitrators in considering Charterers' claim for cargo shortage, noted the following:

"... Because the charter party relieves Owner of the risk of discharge beyond the vessel's permanent hose connections, it is Charterer's obligation to establish the existence of a cargo shortage on the vessel itself, and certainly prior to the time the cargo is pumped through the ship's manifold."

* * *

"... Quantity figures taken from the receivers shore tanks, attested to by an employee of the receivers, is not a proper method of establishing the amount of cargo in ship's tanks or the quantity discharged through the vessel's manifold."

In short, there is both judicial and arbitral precedent to support Owners' position that shore measurements taken after the defendant's duty towards the

plaintiff had ended and the cargo was discharged into plaintiff's hands is not a proper reflection of the amount of cargo actually delivered by the vessel. Secondly, plaintiff has offered no authority in support of its position but rather, relies on "apples and oranges" argument to support its position. Such an argument is nothing more than an attempt to circumvent legal precedent and manipulate the figures in order to justify its claim.

Furthermore, it is clear from the decision in Dow Chemical that the claimant must conclusively establish a cargo shortage upon the vessel's arrival, or unless the ship's figures upon arrival prove a shortage, the carrier cannot be found liable.

A comparison of the various net and gross figures, some showing a surplus, are confusing, but they do not point to a shortage. In Dow Chemical the Court was also faced with ship's ullages indicating a surplus on arrival at Rotterdam, and found no liability on the carrier's part since no shortage had been proven to exist upon arrival prior to discharge and a dry tank certificate established that the entire cargo on board had been discharged.

A similar situation presented itself in the arbitration The Draconia, 1969 AMC 2196, which involved a shortage on outturn of a cargo of scrap iron. There, as here, the Panel was faced with some confusion over the exact amount of cargo that had been loaded aboard the vessel. As in the present case, however, it was clear that:

"The ship delivered all the cargo that was on board and no evidence was produced that vessel did, or even had the opportunity to, discharge any of the cargo prior to destination.

* * *

The Panel finds that there was no exact determination of the amount of cargo that went into the vessel and that all the cargo aboard was delivered. Therefore, Charterers' claim for shortage of cargo in amount of \$29,945.10 is denied." (1969 AMC at 2199-99).

Defendant submits that this reasoning is most persuasive with regard to the present claim, since the myriad of self-contradictory figures produced by the plaintiff regarding the quantities loaded and discharged produce one result - confusion. The evidence certainly does not establish a shortage at discharge, and certainly no liability on defendant's part. Rather, the Dry Tank Certificate establishes that the defendant delivered all of its cargo. Defendant submits that on the basis of the Court's decision in Dow Chemical (U.K.) v. Giovannella

D'Amico, supra, and the persuasive authority of arbitration The Draconia, supra, the confusing set of figures presented by plaintiff fails to establish its claim, and since it is clear that defendant discharged its entire cargo upon arrival at Rotterdam, no liability exists.

ANSWERING

POINT IV

THE DISTRICT COURT WAS CORRECT IN
REFUSING TO INCLUDE AS AN ELEMENT
OF DAMAGES THE COST OF TRANSPORT-
ING A REPLACEMENT CARGO TO THE
PORT OF DISCHARGE

The District Court was absolutely correct in denying Plaintiff's claim for transportation costs because there was not one iota of evidence to support this claimed loss. No evidence was offered that Plaintiff paid freight for the delivery of the cargo in question or that it paid additional freight for a replacement cargo.

A statement of loss even though admitted into evidence is not proof that the losses contained thereon were in fact losses. There was no evidence that Plaintiff had ever paid freight. Plaintiff did, however, offer evidence that it paid for the cargo itself and in fact Defendant insisted that it do so notwithstanding the fact that this statement of loss was in evidence.

It was not Defendant's obligation or burden to question the actual cost of transportation or to challenge the propriety of the freight charges asserted since Plaintiff failed and neglected to offer any evidence as to the payment of any such freight charges. The initial burden was for Plaintiff to prove its damages. With respect to the

cost of transportation, it failed to prove such damages and the District Court properly denied this element of damages for lack of proof.

ANSWERING

POINT V

THE DISTRICT COURT WAS CORRECT IN
MEASURING THE EXTENT OF PLAINTIFF'S
DAMAGES

The correct measure of damages in a cargo shortage case is the market value of the cargo at the port of destination. Plaintiff offered absolutely no evidence as to the market value of the alleged lost cargo at Rotterdam.

As an alternative it attempted to prove its damages by establishing the price it paid for the cargo from an affiliated company which had simultaneously purchased the same cargo at a lower price from a third party.

The District Court correctly chose to determine the value of the cargo by taking the price paid to a third party rather than the price paid between two affiliated companies. It is significant that the two sales occurred simultaneously and that the market value would not have increased. Rather, plaintiff herein was providing a profit to its affiliated company for reasons best known to the Exxon Corporation.

Defendant had no obligation to prove the market value of the crude oil either at Bonny or Rotterdam. Defendant, however, had the obligation to require Plaintiff to prove the market value at Rotterdam by competent evidence. Plaintiff failed to do so and the District Court was correct in determining the market value at Bonny to be the price paid by Plaintiff's affiliate to the BP Trading Limited, a third party.

CONCLUSION

It is respectfully submitted that this Court should reverse the judgment of the District Court holding that there was a short delivery of cargo and that no custom existed permitting a 0.5% loss tolerance. Alternatively, should this Court affirm the District Court's findings with respect to these two issues we respectfully submit that this Court should affirm the entire decision of the District Court.

Dated: New York, New York

June 10, 1977

Respectfully submitted,

CARDILLO & CORBETT
Attorneys for Plaintiff
Appellants-Cross-Appellees

RICHARD W. BALDWIN

Of Counsel

(2) **COPY RECEIVED**

JUN 10 1977

KIRLIN, CAMPBELL & KEATING